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July 3, 2013

The Honorable John F. Anderson
United States Magistrate Judge
United States District Court for the Eastern District of Virginia
Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, VA 22314

Re: *United States v. Kim Dotcom, et al., Case No. 1:12-cr-3*

Dear Judge Anderson:

We are writing to alert the Court to the recent revelation that on February 1, 2013, LeaseWeb deleted all data from 630 servers previously leased to Megaupload in the Netherlands.¹ This wholesale destruction of millions of Megaupload users' personal files was in direct contravention of Megaupload's and Electronic Frontier Foundation's ("EFF") repeated requests to LeaseWeb for data preservation pending resolution of the U.S. criminal case. Specifically, in a letter dated April 3, 2012, EFF wrote to LeaseWeb "to formally request that [LeaseWeb] preserve that material both for purposes of contemplated future litigation and as a matter of obligation and courtesy to the innocent individuals whose materials have unfortunately been swept up into this case." EFF's letter further requested "that anyone with access to our client's materials, or evidence potentially relevant to an action filed on behalf of our client or other similarly situated third parties, immediately institute a litigation hold that covers all reasonably potentially relevant evidence, e.g., the complete set of data on servers used by Megaupload." Similarly, on March 1, 2012, Megaupload asked LeaseWeb to confirm "that it will preserve the Megaupload data," noting that "this request is supported by multiple

¹ Further information regarding LeaseWeb's deletion of server data is available at <http://torrentfreak.com/leaseweb-wipes-all-megaupload-user-data-dotcom-outraged-130619/> and <http://torrentfreak.com/dotcom-reveals-megaupload-data-massacre-emails-plans-to-sue-leaseweb-130626/>.

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axiomatic reasons including that it is relevant evidence in a pending criminal case in the US, potential civil case(s), and destruction of such data will interfere with the possible return of such data to consumers.²

In addition to destroying petabytes of Megaupload user data, Leaseweb's actions have impaired our clients' defense, as the servers contained vast amounts of potentially exculpatory evidence directly relevant to the U.S. criminal case. While LeaseWeb's deletion of relevant evidence in the face of explicit preservation requests is inexcusable, the United States is equally culpable. The Government was plainly on notice of the need to preserve the LeaseWeb servers.³ As Megaupload has long maintained, by freezing the Defendants' assets and denying Defendants access to or possession of the servers, the Government has exercised *de facto* control over the servers and is therefore in constructive possession of them. Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the Government had an affirmative duty to ensure the preservation of the LeaseWeb servers and the exculpatory evidence they may have contained. The Government failed to do so.

The destruction of the LeaseWeb servers demonstrates the urgent need to reach a workable solution for data preservation as soon as possible, lest the 1,103 servers currently in Carpathia Hosting's possession meet the same fate. We therefore respectfully urge the Court to reconvene the interested stakeholders and renew negotiations as quickly as the Court's schedule permits.

Sincerely,



William A. Burck
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Ira P. Rothken
The Rothken Law Firm

Enclosures

² Copies of the EFF and Megaupload letters are enclosed for the Court's reference.

³ See, e.g., April 3, 2012 Letter from EFF to LeaseWeb (Dkt. 57); Megaupload's Response to Emergency Motion for Protective Order by Carpathia Hosting, Inc. (Dkt. 67-1), at 7 n.4 ("Like Carpathia, Leaseweb is refusing to continue to maintain the servers as of April 13 absent appropriate compensation. Megaupload would hope to use its assets upon release by the Court to ensure preservation on that front as well."); April 18, 2012 Letter from Megaupload to Jay V. Prabhu, at 2 ("Because a similar problem exists with servers currently maintained by Leaseweb in the Netherlands, we hope and envision that the ultimate solution for preservation of the servers held by Carpathia can likewise be applied to those in Leaseweb's possession?"). A copy of the April 18, 2012 letter is enclosed for your reference.

cc: The Honorable Liam O'Grady, United States District Judge
Jay V. Prabhu, Assistant United States Attorney, counsel for the United States
Marc J. Zwillinger, counsel for Carpathia Hosting, Inc.
Julie P. Samuels, counsel for Kyle Goodwin
Paul M. Smith & Julie M. Carpenter, counsel for Motion Picture Association of America
W. Clifton Holmes, counsel for Valcom, Inc. and Microhits, Inc.